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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

W. DEVIER PIERSON
PETER J. LEVIN
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

Counsel for Respondent
United Gas Pipe Line Company

WILLIAM B. CASSIN
Executive Vice President
and General Counsel
United Gas Pipe Line Company
700 Milam — P.O. Box 1478
Houston, Texas 77001

SHARON PIERSON SEMMES
CROLIUS AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

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United Gas Pipe Line Company ("United"), an intervenor in the proceeding below before the United States Court of Appeals for the Fifth Circuit, herein files its brief in opposition to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission ("Commission").

OPINIONS BELOW AND JURISDICTION

The opinions below and the jurisdictional requisites are adequately set forth in the petition for a writ of certiorari ("petition").

QUESTIONS PRESENTED

Whether, in connection with its approval of pipeline curtailment plans, the Commission is barred by Section 4(a) or 4(b) of the Natural Gas Act from consideration of any proposal whereby high-priority pipeline customers would compensate low-priority customers for some or all of the increased costs of alternate fuels used by the low-priority customers as a result of the curtailment of natural gas deliveries.

STATUTES INVOLVED

In addition to the statutes cited in the petition, Section 16 of the Natural Gas Act, 52 Stat. 821, *et seq.* is also relevant to this proceeding:

Section 16, 15 U.S.C. § 717o (1970):

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, appplications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective

> on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

STATEMENT

United adopts the statement of the case set out in the petition.

STATEMENT OF REASONS FOR DENYING THE WRIT

1. Contrary to the question presented in the petition, the court of appeals has not held that the Commission "... is *required* under the Natural Gas Act *to impose*" compensation arrangements such as that proposed by the Mississippi Public Service Commission.[1] Rather the court of appeals has held that the Commission, in exercising its authority to assure the implementation of just and reasonable curtailment plans, has jurisdiction *to consider* such compensation proposals and should exercise this jurisdiction.

The distinction is significant. Rather than mandating "... a general restructuring of pipeline rates for sales of natural gas ..." (petition, p. 10), the court of appeals has held that the Commission is not barred as a matter of law from attempting to allocate the economic burden of curtailment in as fair a manner as possible through full exercise of its curtailment authority. Every compensation proposal need not be

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[1] Petition, p. 2 (Emphasis added).

approved and many curtailment programs may be found to be just and reasonable without such a provision.

2. The Commission's curtailment authority as confirmed by the Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), clearly embraces the jurisdiction to consider compensation arrangements as part of a curtailment plan. The arguments in the petition, like the Commission's arguments to the court of appeals, essentially turn on the contention that consideration of compensation arrangements constitutes "rate-setting" and thus is subject to the Natural Gas Act's limitations upon the Commission's power to set rates. In *Louisiana Power & Light,* the Court disposed of essentially this same contention, holding that the Commission had authority to order curtailments to direct sales customers, notwithstanding the lack of rate-setting authority over such customers, because

> . . .[c]urtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of § 1(b) that "[t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce. . . ."[2]

The Court went on to observe that the FPC possessed broad authority to meet its curtailment responsibilities:

> Since curtailment programs fall within FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to

[2] 406 U.S. at 638.

> make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942).[3]

Relying on the holding in *Louisiana Power & Light,* the court of appeals correctly held that the inclusion of compensation arrangements in a curtailment plan, should the Commission find such arrangements to be just and reasonable, was well within the Commission's broad curtailment jurisdiction and is not proscribed by the Natural Gas Act's limitations on the Commission's rate-setting powers.[4] Since the decision of the court of appeals clearly falls within the ambit of *Louisiana Power & Light*, it should not be disturbed.

3. In two recent cases, the Court has rejected similar Commission attempts to contrue its jurisdiction narrowly. In *FPC* v. *Conway Corp.*[5] the Court held that the Commission, in evaluating the justness and reasonableness of a power company's proposed wholesale rate increase, has jurisdiction to consider allegations that the proposed rates are discriminatory and noncompetitive in relation to the company's retail rates. The Commission had urged that it had no authority to consider the allegations of unfairness based upon a relationship between the power company's wholesale and retail rates since it had no jurisdiction to change the latter rates. The Court rejected this "jurisdictional barrier,"[6] noting that the Commission had adequate power to remedy the alleged unfairness by ap-

[3] *Id.* at 642.

[4] 522 F.2d at 1349-50.

[5] — U.S. —, 44 U.S.L.W. 4777 (U.S. June 7, 1976).

[6] *Id.* at 4780.

propriate order directed to the jurisdictional rate, and that

> [t]he Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will have anticompetitive effects.[7]

Similarly, in *NAACP* v. *FPC*[8] the Court rejected the Commission's contention that it lacked jurisdiction to consider or require evidence concerning the employment procedures of the companies it regulates. As in *Conway,* the Court found the Commission's construction of its jurisdiction to be excessively limited, and held that the Commission in the exercise of its rate-making jurisdiction

> . . . has ample authority to consider whatever evidence and make whatever inquiries are necessary to determine whether a regulatee has incurred unnecessary or illegitimate costs because of racial discriminatory employment practices. 15 U.S.C. §§ 717 c(e), 717 m; 16 U.S.C. §§ 824 d(e), 824 f.[9]

The Court has held in *Conway* and *NAACP* that in carrying out its rate-making responsibilities the Commission's jurisdiction is broad and properly encompasses conditions or practices not directly regulated. Similarly, in carrying out its curtailment responsibilities, the Commission's curtailment authority as upheld in *Louisiana Power & Light* is sufficiently broad to include consideration of compensation proposals even if such consideration may impinge on areas not directly regulated.

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[7] *Id.* at 4779.

[8] — U.S. —, 44 U.S.L.W. 4659 (U.S. May 19, 1976).

[9] *Id.* at 4661.

4. There is no record support for the contention that a "compensation scheme of the sort envisioned by the court of appeals would tend to defeat the objectives of end-use curtailment. (Petition, p. 15.) Presumably, were defeat of end-use curtailment found to be the result of any particular "compensation scheme," this finding would be a basis for rejecting the scheme as an unjust and unreasonable element of a curtailment plan. It does not follow, however, that any type of compensation arrangement on United's system would be repugnant to curtailment based on end-use. Whether or not a compensation plan is approved by the FPC, it would not affect the *volumes of gas* high priority customers receive. However, the Commission should also determine—on a case-by-case basis—whether compensation to curtailed customers will make the end-use program more equitable.

5. Much of the Commission's argument in support of the petition is based upon a record not yet ripe for review by the Court. The Commission has relied upon, and reproduced in its petition, its orders in *Transcontinental Gas Pipe Line Corp.*[10] and the dissenting opinion of Judge MacKinnon in the remand of the *Transcontinental* case by the United States Court of Appeals for the District of Columbia Circuit.[11] As is evident from the petition, the compensation question in the *Transcontinental* case is still awaiting decision by the District of Columbia Circuit pending action by the Commission on further issues remanded to it. Under these circumstances, it is premature for the Com-

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[10] Docket No. RP72-99.

[11] Transcontinental Gas Pipe Line Corp. v. FPC, — F.2d — (No. 74-2036, D.C. Cir., Feb. 6, 1976).

mission to rely on excerpts from the *Transcontinental* record to support the granting of a writ of certiorari in this case.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

W. DeVier Pierson
Peter J. Levin
1054 Thirty-first Street, N.W.
Washington, D. C. 20007

Counsel for Respondent
United Gas Pipe Line Company

William B. Cassin
Executive Vice President
and General Counsel
United Gas Pipe Line Company
700 Milam—P.O. Box 1478
Houston, Texas 77001

Sharon Pierson Semmes Crolius and Finley
1054 Thirty-first Street, N.W.
Washington, D. C. 20007

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